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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1145

THOMAS F. GORDON,

Petitioner,

v.

THE BROOKLYN BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Preliminary Statement

Petitioner seeks a writ of certiorari to review an order of the Appellate Division, Second Department, of the Supreme Court of the State of New York (hereinafter referred to as "the Appellate Division"), made and entered on July 1st, 1968, suspending petitioner from the practice of law.

Claimed Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C. 1257(3).

Constitutional And Statutory Provisions Involved

The pertinent constitutional and statutory provisions are set forth in the Appendix to this brief. They are: The Fourth, Fifth and Eighth Amendments and Section 1 of the Fourteenth Amendment to the United States Constitution, New York Judiciary Law, Section 90, subd. 2 and New York Civil Practice Law and Rules, Rule 4403.

The Questions Sought To Be Presented

The petition, at page 2 thereof, seeks to refer three purported questions to this Court.

As will be hereinafter demonstrated, said questions so stated are either not founded on any factual basis to be found in the record, or for the other reasons ascribed in this brief, same do not present any Federal questions for this honorable Court's determination.

Respondent's Exception To Statement Of Case In Petition

In order not to render this brief unduly prolix, but without conceding the accuracy of the "Statement of Case" set forth in the petition herein, it is respectfully submitted that various inaccuracies therein or omissions therefrom are pointed out in the Points below for the purposes of this brief.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

POINT I

This case is in no respect comparable to *Spevack* v. *Klein*. Petitioner was not disciplined for any failure to cooperate with the grievance committee, his admissions to the committee were voluntary, and the disciplinary proceeding result was amply supported by the proof at the hearing before the Referee and by voluntary and untainted admissions by petitioner's answer.

The first question sought to be raised by the petition to this Court is stated as follows:

> "1. Whether the Fifth Amendment privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, precludes an attorney's failure to provide information to the Grievance Committee of a bar association in its investigation of complaints against him from being made the basis of disciplinary charges against the attorney." (Pet.*, p. 2)

It would therefore appear that the petitioner seeks to apply the doctrine of *Spevack* v. *Klein*, 385 U. S. 511, to this case. Later, in the petition herein, under the heading "REASONS FOR GRANTING THE WRIT", this purported question became transmuted into a claim that petitioner's Constitutional rights were allegedly violated in that:

> ". . . (2) The use in the disciplinary proceeding of admissions made by petitioner under threat of disbarment constitutes a violation of the Fourth and Fifth Amendments." (Pet., p. 7)

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* References herein to "Pet." refer to the petition herein for writ of certiorari.

There is no factual or other basis in this case for either the question or the claim of alleged violation of Constitutional rights.

a.

The Appellate Division did not discipline petitioner for failure to cooperate with the respondent's Grievance Committee (hereinafter referred to as "the grievance committee"). The petitioner was disciplined for neglecting his clients' interests in all four of the matters under complaint; for failing to advise his clients of the true status of their claims in three of the matters under complaint; for making general, elusive and untrue responses to the clients' inquiries in three of the matters under complaint and for failing to respond to repeated inquiries by the client in the fourth matter. At no point in the Referee's report (OP* Item 5) or in the decision or order of suspension of the Appellate Division (OP Item Group 6), or in any other Court decision or order was there the remotest reference to any failure on petitioner's part to cooperate with the grievance committee. This clearly appears from the petition itself, which contains in the appendix thereto (Pet., pp. 19, 20) a copy of the body of the Appellate Division's decision.

This is the fact notwithstanding the assertion in the petition herein that

> ". . . The decision of the Appellate Division dated July 1, 1968, contained the statement with respect to the findings of the referee that 'these findings were established by the admissions in respondent's [petitioner's] answer to the petition'. The decision of the Appellate Division thus relied in part upon petitioner's admissions with respect to the allegations in the peti-

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* References herein preceded by the symbol "OP" refer to the original papers transmitted to this Court by the Appellate Division and itemized in the schedule furnished therewith.

> tion that he failed to furnish information to the Committee on Grievances." (Pet., p. 5)

Parenthetically, it will be noted that in two of the four matters complained of, the respondent's petition in the disciplinary proceeding (hereinafter referred to as "the Bar Association petition") shows that, contrary to the view of the petitioner herein, petitioner ultimately did cooperate with the grievance committee and in a third case was not even called upon for any cooperation (Bar Association petition, pp. 2, 6, 7—OP Item group 1).

b.

It is self-evident from a reading of the transcript of the disciplinary proceeding hearing before the Referee (said hearing being hereinafter referred to as "the Referee's hearing") that the petitioner was not called to testify at the Referee's hearing, that he did not testify thereat and that no attempt was even made to introduce any transcripts of prior testimony by petitioner before the grievance committee (Transcript,* pp. 1-132—OP Item 3). Consequently there cannot be, and there is not any claim in any part of the record that such was the case.

In his affidavit in opposition to the motion to confirm, in part, and disaffirm, in part, the Referee's report in the disciplinary proceeding (such motion being hereinafter referred to as "the motion on the Referee's report"), petitioner gave as his reason for not testifying at the Referee's hearing that

> "The actions involved in this proceeding had their origin in 1953, 1955, 1961 and 1962, and in view of the admissions contained in your deponent's answer, as aforesaid, and the fact that your deponent was

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* References herein to "Transcript" are to the transcript of the Referee's hearing.

unable to recall the particular content of any conversation had with his client over the span of years, accordingly deponent deemed it proper that he not testify at the hearing." (Affidavit dated June 4, 1968 —OP Item group 6)

c.

In the petition herein the words or phrases (or variations thereof) "threat of disbarment",* "coercion"** and "compulsion"*** were employed to describe or refer to testimony or admissions or production of records**** to the extent that it would seem to appear that the record shows that petitioner's admissions to the grievance committee were brought about by "threat of disbarment", "coercion" or "compulsion".

However the record fails to reveal any evidence that petitioner was ever threatened with disbarment or other discipline, or was under compulsion or coercion when he made the admissions to the grievance committee alleged in the Bar Association petition. There is no such evidence because it is not the fact.

The sole indication, however remote, of any causative reason for any appearance by petitioner before the grievance committee to be found in the record is with respect to the Kennedy complaint. On the Referee's hearing, petitioner's then counsel conceded (Transcript, p. 12) that petitioner was requested, not subpoenaed, to appear before the grievance committee. Such appearance must therefor be deemed to have been voluntary, particularly since it occurred on July 19, 1967, months after the deci-

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* Petition herein, at pp. 7, 9, 10, 11 and '.

** Petition herein, at pp. 6, 10 (three times), 11 (two times) and 14.

*** Petition herein, at pp. 4, 11 (five times), 12 and 14 (four times).

**** Records are not an issue herein (see pp. 10, 11 of this brief).

sion of this Court in *Spevack* v. *Klein*, 385 U. S. 511 (Bar Association petition, p. 6). Without any particular reference, the petition herein recites that "Petitioner . . . complied with a request by the Grievance Committee for information" (Pet., p. 9).

d.

Petitioner never invoked a Fifth Amendment privilege at any of the times he made the admissions to the grievance committee alleged in the Bar Association petition. Such admissions were therefor properly employed in the Bar Association petition.

e.

There being no basis for any claim that petitioner's admissions were brought on by "threat of disbarment", or "coercion" or "compulsion", petitioner falls back at one place in his petition herein on the phrase "implied threat of disbarment", apparently relying on *Cohen* v. *Hurley*, 366 U. S. 177, in justification (Pet., p. 9).

As has been seen, petitioner never invoked any Fifth Amendment privilege when making his admissions to the grievance committee and he did not raise any claim of privilege by his answer. The admissions are, accordingly, untainted. *Matter of Robert R. Kaufman*, 25 A. D. 2d 48, motion for leave to appeal denied 18 N. Y. 2d 718, cert. denied 389 U. S. 1048, sub nom. *Kaufman* v. *Association of Bar of City of New York*; *Curry* v. *Florida Bar*, 211 So. 2d 169, cert. denied 393 U. S. 981; *Matter of Sgarlato*, 27 A. D. 2d 738, affirmed 22 N. Y. 2d 813, cert. denied 393 U. S. 968, *sub nom. Sgarlato* v. *Klein*.

Coupling the assertion of an "implied threat of disbarment" with the *Cohen* v. *Hurley* decision of this Court, the best view that can be afforded to the claim now being apparently asserted is that petitioner contends that voluntary disclosures which were made by him to the grievance com-

mittee and were later alleged in the Bar Association petition were induced by a fear of disbarment under *Cohen* v. *Hurley* and therefore tainted.

The pattern of such argument is that which was made in several cases recently presented to this Court, in which certiorari was denied. *Matter of Zuckerman,* 20 N. Y. 2d 430, cert. denied 390 U. S. 925 *sub nom. Zuckerman* v. *Greason,* rehearing denied 390 U. S. 975; *Matter of Klebanoff,* 27 A. D. 2d 332, affirmed 21 N. Y. 2d 920, cert. denied 393 U. S. 840 *sub nom. Klebanoff* v. *Coordinating Committee on Discipline;* see also *Matter of Sgarlato,* 27 A. D. 2d 738, affirmed 22 N. Y. 2d 813, cert. denied 393 U. S. 968 *sub nom. Sgarlato* v. *Klein.*

It is pertinent here to quote from the New York Court of Appeals decision in the aforementioned *Matter of Zuckerman,* 20 N. Y. 2d 430, which held (at p. 439) that attorneys

> ". . . are not required to invoke the Fifth Amendment to the Constitution of the United States but may choose to reveal their professional conduct to the scrutiny and evaluation of the Appellate Division when its propriety is drawn in question. To determine whether they have been motivated in doing so by the holding in *Cohen* v. *Hurley* prior to the decision in *Spevack* v. *Klein* or by other reasons would be a speculative inquiry, incapable of and unsuitable to being resolved as a question of fact."

f.

In the State Courts below, as in the petition herein, petitioner, quoting out of context, asserted and still asserts that:

> ". . . The decision of the Appellate Division dated July 1, 1968, contained the statement with respect to the findings of the referee that 'these findings were established by the admissions in respondent's [petitioner's] answer to the petition'." (Pet., p. 5)

See also: affidavit dated July 16, 1968 (p. 2—OP Item group 8).

Actually, what the Appellate Division's decision stated was that:

> "In our opinion, these findings were established by the admissions in respondent's* answer to the petition and by the proof at the hearing; . . ." (Appellate Division decision—OP Item group 6)

Indeed, the full context is included in the Appendix to the petition herein, at page 20.

With respect to such admissions as were relied upon by the Appellate Division as part of the case against the petitioner, it was clearly not a deprivation of any Constitutional right or safeguard when the Appellate Division relied on admissions in the disciplinary proceeding, including admissions arising because petitioner declined to deny by his answer allegations of the Bar Association petition. *Matter of William Robert Klein,* 23 A. D. 2d 356, affirmed 18 N. Y. 2d 598, cert. denied 385 U. S. 973 *sub nom. Klein* v. *Klein,* rehearing denied 385 U. S. 1032, second pet. for rehearing denied 388 U. S. 925.

It is undisputed that under New York practice, allegations in the Bar Association petition undenied by the answer were deemed admitted as a matter of law. This is recognized by the petition herein (Pet., pp. 3, 7).

Further, the admission of such undenied allegations of the Bar Association petition (see Bar Association petition and answer of the petitioner herein—OP Item group 1) was confirmed by counsel who represented petitioner on the Referee's hearing (Transcript, pp 14-17) and was thereafter again acknowledged in various documents submitted

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* Petitioner herein.

by petitioner. For example, in his affidavit in opposition to the motion on the Referee's report, petitioner averred that:

> "Deponent, in answering the said Petition, admitted the allegations in twenty-one of said paragraphs. The only complete denial to all of the allegations in any paragraph was that numbered 5 . . ." (Affidavit dated June 4, 1968—Item group 6)

A reading of the record will show that, in addition to admissions, adequate and legally sufficient independent evidence was adduced in support of the allegations of the Bar Association petition on the Ahern complaint (Transcript, pp. 36-57), the Amontjelis (Paradiso) complaint (Transcript, pp. 20-35; Petitioner's* Exhibit 3—Item group 4) and the Lanzillota complaint (Transcript, pp. 73-104, 109-114; Petitioner's* Exhibits 7, 8, 9—OP Item group 4). There was no testimony in support of the Kennedy complaint only because all of the allegations of the Bar Association petition with respect thereto had been admitted by the answer and were recognized to have been so admitted (Transcript, pp. 16, 17, 59).

8.

Petitioner, for the first time, makes a claim, ostensibly invoking a Fourth Amendment safeguard, in the petition herein. No such claim was made or asserted in any of the Courts below. This is conceded in the petition herein (Pet., p. 14 footnote).

It is elemental that a Constitutional claim should not be considered if raised for the first time in a petition to this Court for a writ of certiorari. *Worthy* v. *Moore County,*

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* Respondent herein.

76 U. S. 611; *Spies* v. *Illinois,* 123 U. S. 131; *Brooks* v. *Missouri,* 124 U. S. 394; *Rogers* v. *Clark Iron Co.,* 217 U. S. 589.

As a matter of fact, with respect to physical evidence, there is no mention in the record of any use by respondent herein of books, records or papers belonging to or in the possession of the petitioner at any time prior to or during the course of the disciplinary proceeding. The only documents of such nature were introduced voluntarily by the then counsel for the petitioner herein and then only in behalf of the petitioner herein, who now seeks to raise a Fourth Amendment privilege not available to him (Respondent's* Exhibits A through E, G, H—OP Item group 4).

POINT II

There has been no violation of the doctrine of *Griffin* v. *California* in this case.

The second question sought to be presented to this Court by the petition herein is stated as follows:

> "2. Whether the Fifth Amendment privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, precludes adverse factual inferences to be drawn from an attorney's failure to testify in disciplinary proceedings against him."

Apparently, petitioner by this purported question seeks to apply the doctrine of *Griffin* v. *California,* 380 U. S. 609, to this case, which bears no resemblance to the *Griffin* v. *California* case and bears no relationship to the doctrine enunciated in that decision.

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* Petitioner herein.

In *Griffin* v. *California,* it was held by this Court that in a criminal case,* the prosecutor may not comment on the accused's silence and the Court may not instruct the jury, the decider of the facts, that such silence is evidence of guilt.

In this case, it is now urged by petitioner that the inclusion in the Referee's report of the objective statement that

> "Respondent [petitioner] did not testify at the hearing." (Pet., p. 5)

violates the doctrine of *Griffin* v. *California.*

Petitioner ignores the fact that in *Griffin* v. *California,* 380 U.S. 609, at page 614, this Court recognized that what the decider of the facts, the jury, infers from the silence of the accused is up to the jury. In this case the Appellate Division (in part through the medium of a Justice of the Supreme Court of the State of New York whom it had appointed to hear the facts in issue and to report back to it thereon) was the decider of the facts.** The Referee in this case was, in effect, an extension of the Appellate Division itself, appointed to assist the Appellate Division in gathering the facts. *Austin* v. *Ahearne,* 61 N. Y. 6; *Barnum* v *Goes,* 240 A. D. 803.

Nothing appears in the decision or order of suspension of the Appellate Division (OP Item group 6) that conveys in any sense or respect the impression that said Court attached any significance whatever to petitioner's silence at the Referee's hearing.

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* Which the case herein is not conceded to be. *Ex parte Wall,* 108 U. S. 265; *Cf. In re Ruffalo,* 390 U. S. 544 for reference to disciplinary proceedings as "quasi-criminal" for purposes of the necessity for adequate notice of charges against the attorney to satisfy due process requirements.

** See New York CPLR Rule 4403 (Appendix hereto, p. A2).

POINT III

Petitioner has not been deprived of due process in that (a) double jeopardy is not involved in this case, and, moreover, petitioner was not twice put in jeopardy, (b) the discipline imposed on petitioner is entirely reasonable and certainly not a "cruel and unusual punishment".

The third question sought to be raised by the petition herein is stated as follows:

> "3. Whether the due process clause of the Fourteenth Amendment is violated by basing charges in a disciplinary proceeding on matters which had previously been considered and dismissed by the grievance committee of the bar association, 'an arm of the Appellate Division,' and by imposing a sanction destructive of an attorney's practice on the basis of conduct which involved no intentional wrongdoing and resulted in no injury to any client." (Pet., p. 2)

It would appear that the assertion being made by this question is two-fold. Precisely what the two facets of this purported question really import requires extensive search in the petition.

a.

To determine what was intended by the claim that the due process clause of the Fourteenth Amendment was allegedly violated by "basing charges in a disciplinary proceeding on matters which had previously been considered and dismissed by the grievance committee", we find at page 16 of the petition that the argument is that "(e)lementary fairness, resting on double jeopardy concepts embodied in our fundamental law, would seem to preclude matters which have already been adjudicated by 'an arm of the Appellate Division' from being the subject of subse-

quent disciplinary proceedings by the Appellate Division". [It will be noted that what the grievance committee is claimed to have done was changed from "considered" in the original question to "adjudicated" in the argument (see further use of "adjudicated", at Pet., pp. 4, 6).]

We are compelled to assume that petitioner's stance is that protection against double jeopardy under the Constitution protects him in this case. Petitioner raises this alleged claim only with respect to two of the four matters under complaint (Pet., pp. 4, 6, 15, 16).

As has hereinbefore been noted, it is not conceded that the disciplinary proceeding herein is a criminal case (footnote, p. 12 hereof). However, even assuming, *arguendo* (but without thereby conceding), that this case were to be deemed a criminal case for purposes of "double jeopardy concepts", there has been no double jeopardy in this case and petitioner was not twice put in jeopardy, for the reasons stated below.

By virtue of New York Judiciary Law, Section 90, subd. 2, the sole body that has the authority to adjudicate complaints of wrongdoing against an attorney and to impose discipline on an attorney is an Appellate Division of the Supreme Court of the State of New York (See appendix hereto, p. A2).

No authority or power to impose discipline is vested in any Bar Association grievance committee. The sole function of the grievance committee is to receive and inquire into charges against an attorney and, if the grievance committee satisfies itself that the facts warrant it, to present such charges to the Appellate Division, for adjudication and for such action in respect of the attorney as the Appellate Division may deem warranted, after adjudication. *In re Dolphin,* 240 N. Y. 89; *Wiener* v. *Weintraub,* 22 N. Y. 2d 330. In the last cited decision, the New York Court of Appeals held that in investigating complaints and in satis-

fying itself as to whether or not the charges asserted against an attorney should be brought to the attention of the Appellate Division, a grievance committee acts as "an arm of the Appellate Division" and the investigation or preliminary proceeding is "quasi-judicial" in nature, thus affording a privilege against libel action to a complainant against an attorney.

If we then consider, as we must, that a grievance committee conducts a preliminary inquiry with respect to a disciplinary proceeding, it is quite analogous to a grand jury, which conducts a preliminary inquiry with respect to a criminal case, for it is a grand jury's function to determine whether or not charges against a prospective defendant shall be returned in an indictment.

Clearly, there is no impediment under the New York Constitution or statutes to the action taken against the petitioner herein in the disciplinary proceeding in the Courts below. Is there any Federal Constitutional impediment to such action? It is respectfully submitted that there is not.

It has been held that a grievance committee's acts are "quasi-judicial" and constitute a preliminary or "first instance" inquiry. *Doe* v. *Rosenberry,* 225 F. 2d 118. Comparably, a proceeding before a grand jury has been held to be a "judicial inquiry". *Cobbledick* v. *United States,* 309 U. S. 323. Comparable to a grievance committee, a grand jury has been held to be an "arm of the court", *Marcus* v. *United States,* 310 F. 2d 143, 146; *In re Lazarus,* 276 F. Supp. 434, or an "appendage of the court". *Brown* v. *United States,* 359 U. S. 41, 49.

In this case, prior grievance committees had not brought the derelictions of the petitioner in the Ahern and Amontjelis (Paradiso) matters to the attention of the Appellate Division. Upon being satisfied of continued wrongdoing by petitioner, a subsequent grievance committee decided that

said matters be called to the attention of the Appellate Division together with subsequent wrongdoing (Bar Association petition, p. 2—OP Item 1).

At common law and under the Federal rule, the failure of a grand jury to indict does not operate as a bar to prosecution. A subsequent grand jury can find an indictment on the same set of facts a prior grand jury refused to indict on. *Alexander* v. *United States,* 95 F. 2d 873, cert. denied 305 U. S. 637. Even where there is a court order dismissing a count of an indictment, this would not constitute an adjudication of a fact which would preclude the filing of a superseding indictment on that count. *United States* v. *Root,* 366 F. 2d 377, cert. denied 386 U. S. 912; *United States* v. *James,* 290 F. 2d 866, cert. denied 368 U. S. 834.

Jeopardy could not have attached in this case in any preliminary investigation or inquiry by the grievance committee for the same reasons that jeopardy would not attach at any preliminary inquiry or hearing. Jeopardy could only attach upon the swearing of a jury. *Downum* v. *United States,* 372 U. S. 734, or when a Court, sitting without a jury, has begun to hear evidence. *Hunter* v. *Wade,* 169 F. 2d 973, affirmed 336 U. S. 684. Applying the same principles to this case, although still not conceding this to be a criminal case, the conclusion must necessarily be reached that no jeopardy attached (if any attached at all in a disciplinary proceeding) in this case, before the Referee began to hear evidence at the Referee's hearing.

b.

Contrary to petitioner's repeated assertions that the Ahern and Amontjelis (Paradiso) complaints were flatly "dismissed" (Pet., pp. 2, 4, 7, 15, 16), the grievance committee, although not then presenting the charges in the Ahern and Amontjelis (Paradiso) complaints to the Appellate Division, admonished the petitioner herein in each

such case (Bar Association petition, pp. 3-5—OP Item group 1). Clearly such "dismissals" were not adjudications, for only the Appellate Division had such power or authority. New York Judiciary Law, Section 90, subd. 2. They were the equivalent of a failure of a grand jury to indict, not barring a subsequent charge on the same facts.

The procedure followed in this case reflects a reluctance on the part of grievance committees to present initial charges to the Appellate Division, where there appears hope that the attorney will mend his ways. Where, as in this case, the attorney chooses not to do so, not only is the public harmed, but subsequent charges demonstrate the need for appropriate action by the Appellate Division. Thus, it became necessary for the Appellate Division, First Department, to hold in *In Re Levy,* 19 A. D. 2d 505, that

> "Similar charges brought an admonishment by the Grievance Committee . . . in 1959 . . .
>
> "In view of respondent's demonstrated inability to rectify his conduct in spite of the 1959 warning and in order to protect the public, disciplinary action is indicated . . ."

In the case at bar, the petitioner, having been afforded the opportunity to rectify his conduct, has demonstrated his inability or refusal to do so.

c.

Under the second facet of the third purported question, petitioner claims that the suspension imposed upon him is so severe as to constitute a violation of the due process clause of the Fourteenth Amendment (Pet., pp. 16-18).

On his motion for reargument in the Appellate Division, petitioner asserted that "(t)he punishment is disproportionate to the alleged gravity of the offense and does constitute cruel and inhuman treatment".* Viewed from this

* So in original.

context, it would appear that petitioner relied, at least at that time, in part on the Eighth Amendment, as same might be applicable to the States under the Fourteenth Amendment. In the petition herein there is no reference to "cruel and inhuman treatment" (possibly intended to refer to "cruel and unusual punishment"). The reference now is to "fundamental fairness" and an assertion that the discipline imposed in this case, which petitioner categorizes as "severe" (Pet., pp. 17, 18) or as "extreme" (Pet., pp. 17, 18), constituted a denial of due process because it is "unduly offensive to the sense of fairness inherent in our traditional concepts of liberty and respect for individual rights" or that it "shocks the common understanding of decency and fair play" (Pet., p. 17).

Petitioner blithely urges that "there was no deliberate wrongdoing" on his part (Pet., p. 17), but that the suspension was imposed although based on "findings that he had been neglectful in handling four matters in which he had been retained and that he had been less than frank in disclosing the status of some of these matters upon inquiry" (Pet., p. 15). He also asserts that in two of the cases he paid his clients "the value of their claim" (Pet., p. 15).

These statements are in contrast to the findings and the record. Petitioner concedes that he was neglectful in all four matters under complaint. The findings and record show that in the Ahern and Amontjelis (Paradiso) matters, petitioner never commenced the actions that he had been retained to commence, with the result that same were barred by the Statute of Limitations. He was found to have settled with these clients. There is no indication of what the full "value of their claim" would have been. In the Kennedy matter, petitioner was retained in 1961 in behalf of an injured infant. As of the time of the client's complaint in 1967, petitioner had not commenced any action and the Statute of Limitations had not expired only because

of the infancy of the injured party. In the Lanzilotta matter, petitioner had commenced an action in 1954, but had failed to prosecute same for about 14 years thereafter.

Beyond conceding his negligence, petitioner seeks to ignore the further findings of the Appellate Division that with respect to the first two matters under complaint petitioner "failed to advise the clients of the true status of their claims; and made general, elusive and untrue responses to the clients' inquiries", that with respect to a third matter petitioner "failed to respond to repeated inquiries by the child's father (who had retained . . ." petitioner), and that in the fourth matter petitioner "failed to advise the client of the true status of the matter; and that he made general, elusive and untrue responses to the client's inquiries in 1955, 1957, 1965 and 1967" (See decision of Appellate Division—Op Item group 6). Petitioner is hardly presented in the findings as an unfortunate innocent.

In any event, it is within the sole province of the Appellate Division, absent an abuse of its authority, to determine the discipline to be imposed upon an attorney. *Erie County Water Authority* v. *Western New York Water Co.*, 304 N. Y. 342, cert. denied 344 U. S. 892; *In re Axtell*, 257 N. Y. 210. The discipline imposed on the petitioner is clearly in line with comparable disciplines imposed by Appellate Divisions. For neglecting to prosecute claims for which he had been retained and for misrepresenting the pendency of negotiations thereunder, an attorney was suspended for two years in view of previous charges and his admonishment by a grievance committee. *In re Levy*, 19 A. D. 2d 505. An attorney deceiving his client as to the progress of an action was suspended for two years. *In re Babcock*, 230 A. D. 323. It has also been held that neglect of a client's cause warranted suspension for as long as two years. *In re Sultan*, 26 A. D. 2d 210.

Under New York Judiciary Law, Section 90, subd. 2, the Appellate Division can disbar, suspend or censure. Most

certainly a one-year suspension was not a "cruel and unusual punishment" as contemplated by the Eighth Amendment and cannot be deemed to be so fundamentally unfair as to constitute a violation of due process under the Fourteenth Amendment or to "shock the common understanding of decency and fair play". Under the circumstances of this case, it is respectfully submitted that the discipline to which the petitioner is subjected is reasonable and not an abuse of authority.

d.

Petitioner complains that the order of suspension may require suspension for "considerably more than a year". However, this ignores the fact that the attorney may move for reinstatement at any time "after the expiration of one year" and the order specifically grants him leave to do so (See order of suspension—OP Item group 6). The provisions in said order, requiring satisfactory proof, for reinstatement, of compliance with the order is usual in such suspension orders. See *Matter of Sgarlato*, 27 A. D. 2d 738, affirmed 22 N. Y. 2d 813, cert. denied 393 U. S. 968, *sub nom. Sgarlato* v. *Klein* as an example thereof. The order is clear and unambiguous and should not present any hurdle for an attorney who has been suspended, has complied with the order of suspension and desires to practice again.

Petitioner further complains that, in his view, the suspension will destroy his negligence practice. This, of course, is pure conjecture on his part. From his standpoint a one-month suspension would similarly destroy his practice. What he apparently seems to say is that there should not be any suspensions—just disbarments or censures. It is respectfully submitted that such limitation on the discipline to be imposed on errant attorneys is not realistic either for the Courts administering discipline or for the attorneys under discipline.

POINT IV

No constitutional question is involved in this case and, in any event, there is adequate nonfederal ground on which to sustain the decision and order below.

On the basis of all of the foregoing, it is clear that not only have petitioner's Constitutional rights not been violated, but that there is more than adequate nonfederal ground on which the Appellate Division decision and order were based. Certiorari should be denied accordingly. *Murdock* v. *City of Memphis,* 20 Wall 590; *Herb* v. *Pitcairn,* 324 U. S. 117.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Fourth Amendment, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment, United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

New York Judiciary Law, Section 90

* * * * *

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . .

* * * * *

New York Civil Practice Law and Rules, Rule 4403

Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing . . . Where no issues remain to be tried the court shall render decision directing judgment in the action.